

JUSTICE DENIED

The Magazine for the
Wrongly Convicted

**Lucinda Hites-
Clabaugh**



Exonerated of sexual abuse conviction and released after more than two years of imprisonment in Oregon.
See page 9

Chris von Deutschburg



Acquitted of 1983 murder conviction in Perth, Australia based on new medical evidence the death was due to natural causes.
See page 11

**Josephine
Greensill**



Teacher acquitted of indecently assaulting two students in 1979 in Bayswater, Australia.
See page 13

Samuel Lawson



Granted new trial in landmark Oregon Supreme Court ruling the prosecution's key eyewitness evidence tying him to a double murder was unreliable.
See page 14

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Innocents Database Now Lists More Than 4,000 Cases!

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Message From The Publisher

Erroneous eyewitness identification is a well-known reason for the conviction of innocent persons. To improve the reliability of eyewitness testimony the Oregon Supreme Court has issued new guidelines for its admissibility. See p. 14.

Korian Dunkley’s conviction of the attempted robbery of a store in Sunrise, Florida committed while he was a mile away at a bus stop emphasizes the importance of trial judges excluding unreliable eyewitness testimony. See p. 3.

Perhaps the most egregious miscarriage of justice is when a person is convicted of committing a murder that didn’t happen. That is exactly what happened to Chris von Deutschburg in 1983. Although he was released on parole in 1990, he continued seeking evidence of his innocence. He was acquitted based on new medical evidence the “victim” actually died of natural causes See p. 11.

The worst accusation that can be made against a teacher is he or she sexually mistreated a student. Teachers Josephine Greensill and Lucinda Hites-Clabaugh were cleared on appeal in different cases of sex related charges after their lives were devastated. See. pgs. 9 and 13.

Pursuing executive clemency is the last resort for an innocent person to be released before their sentence expires when the courts fail to act on new evidence of his or her innocence. Barry Beach was taken back into custody when the Montana Supreme Court reversed a state judge’s order for his retrial. With his state court options exhausted Beach filed a 413-page application for commutation of his 100 year sentence. See. p. 5.

Hans Sherrer, Editor and Publisher
www.justicedenied.org – email: hsherrer@justicedenied.org

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My name is Korian Dunkley. I was convicted in 1998 and I'm serving a 35-year sentence in Florida for crimes I am not only actually innocent of, but that Sedrick Johnson has sworn under oath he committed with my two co-defendants who were acquitted.

A cruel twist of fate changed my life forever

I was 17-years-old when on December 26, 1996 I found myself "In the wrong place at he wrong time!"

At about 8 am I was waiting for the bus at the corner of 68th and Oakland Park Blvd. in Sunrise, Florida (west of Fort Lauderdale). Two older acquaintances, Shawn Berry, 25, and Patrick Atkinson, 22, stopped in a car driven by Shawn. I accepted a ride with them when Shawn agreed to drop me off where I needed to be. I was soon to learn that getting into that car was the biggest mistake of my life.

A few minutes into the ride the car was pulled over by the Sunrise Police Dept. I became aware there were guns inside the car when Patrick, who was riding in the rear seat, attempted to conceal them in the back panel of the front passenger seat where I sat. I instantly burst into tears, thinking of the fact I was only 14 days removed from a ten month juvenile sentence and I was on probation. I was aware that if those firearms were somehow discovered in a car search I would be held in violation of my probation for being in the proximity of firearms, and subject to a four to six year youthful offender prison sentence.

I had that in mind, along with the thought of being away from my four-month-old daughter Katrina, when Shawn stopped the car. I saw the officers had their weapons drawn. I carefully opened the passenger door and after I stepped out I took off running.

I was apprehended after a short foot chase by two officers. I ended up needing medical treatment after being punched and kicked in the stomach and rib area by an officer, creating a respiratory issue.

While I was in handcuffs and being treated by a paramedic, the officers had an alleged victim/witness waiting to make a show-up identification to determine whether I was a participant in a crime that had recently occurred—which explained the purpose of the traffic stop.

I was led directly from the paramedic's

Imprisoned For Crimes Sedrick Johnson Has Confessed To Committing – The Korian Dunkley Story

By Korian Dunkley

care, in handcuffs and disheveled, to the road. A police cruiser drove by, purportedly with the alleged victim/witness in its back seat. The police said he made a positive identification of me as being one of the perpetrators in a store robbery attempt. I was arrested and taken to the Sunrise Police Station. When I was interrogated I said I accepted a ride from Shawn and Patrick only minutes before the traffic stop. I was charged even though I didn't match the witness' description of the perpetrator he gave to the first officer to arrive at the scene of the attempted robbery. He said the perpetrator was about **5'10", 170 pounds**, and he was wearing **dark clothing**. In contrast, I was **5'4", 140 pounds**, and I was wearing an **off white, sleeveless Nike T-shirt** with the Nike name and symbol on the front, **beige cargo style pants**, and **white Nike shoes** – none of which matched the description by the victim/witness.

In November 1997 a hearing was held for my violation of probation. My mother was standing in the vestibule area of the courtroom when she observed the prosecuting attorney gesturing through a window that showed the inside of the courtroom. He was indicating to the witness who I was and what I had on, in preparation for his testimony.

My mother informed me as to what she had seen and heard, and I in turn informed my attorney. My attorney filed a motion requesting suppression of the witness' in-and-out of court identification of me and dismissal of all charges. The judge held a hearing during which my mother, testified about what she saw, and when the prosecuting attorney testified he denied anything improper occurred. The judge denied the motion in ruling the witness identified me on the day of the crime, therefore any act of the prosecutor, improper or not, was harmless.

I was convicted while my two codefendants were acquitted

On November 30, 1998 a joint jury trial commenced for me and my two co-defendants (Shawn Berry and Patrick Atkinson). During the four day trial the only person who made an in-court identification of any of us three defendants was the wit-

ness who identified me at the traffic stop. He testified I was one of the perpetrators who attempted to rob the store.

On December 4 the jury returned a verdict acquitting both Shawn and Patrick of all charges. However, I was found guilty of armed burglary of a structure; aggravated assault with a firearm; and three misdemeanors – two counts of improper exhibition of a firearm and resisting arrest without violence. To this moment it is beyond me how the two people it was alleged I attempted to rob a store with were acquitted of all charges, yet I was convicted. It is evident the initial suggestive show-up identification and the prosecutor subsequently instructing the witness whom to identify played a major role in the jury's determination.



Korian Dunkley
(Florida DOC)

The judge sentenced me to life imprisonment on January 22, 1999. The judge didn't consider my age at the time of my arrest, and relied on the conviction for which I was on probation to declare I was a habitual violent felony offender.

My lawyer filed a motion on February 4, 1999 to mitigate my life sentence. The judge granted the motion and entered an order mitigating my sentence to 35 years as a habitual felony offender—one tier below a violent offender.

My direct appeal challenging my convictions and sentence was denied in January 2000 by the Fourth District Court of Appeal.

My mother retained an attorney who filed a post-conviction motion in February 2001 requesting a new trial on the basis my trial counsel was ineffective for failing to object to the prosecutor's pretextual use of a peremptory challenge to remove an African-American juror from the panel for reasons equally applicable to two similarly situated white jurors who were not challenged. The trial court denied the motion, and the Fourth District Court of Appeal affirmed the ruling.

In my continued quest for justice of some sort, in February 2003 I filed a *pro se* motion to correct my sentence as a habitual felony offender that I argued violated Florida Statute 775.084(5). On August 13, 2003, the trial

Dunkley cont. on p. 4

Dunkley cont. from p. 3

court denied my motion, which the Fourth District Court of Appeal affirmed in ruling the issue was procedurally barred because it should have been raised in my direct appeal.

A few years later, in April 2009, I filed another *pro se* motion to correct my sentence. It was based on a 2007 Florida Supreme Court ruling which allowed a defendant to challenge the legality of his/her sentence, where a discrepancy exists between the sentence the judge orally pronounced and that which was written. That was the situation in my case. My motion was denied, which the appeals court affirmed in 2010.

Sedrick Johnson confesses I was convicted in his “stead”

I was facing serving my 35 year sentence without hope for justice when something miraculous happened on August 10, 2012: The perpetrator the eyewitness had mistaken me for discovered I was imprisoned at Union Correctional Institution, where he was imprisoned for crimes he committed in 2001. That man, Sedrick Johnson, was a born again Christian who was remorseful and wanted to make amends for remaining silent as I was prosecuted, convicted, and imprisoned for his crimes.

On December 3, 2012 Sedrick Johnson signed under penalties of perjury a notarized four-page Affidavit. Johnson confesses to his involvement in the attempted robbery of the Uptons store and that I was mistakenly convicted in his “stead.” He also provides intimate details only a participant could know about the planning and commission of the attempted robbery he carried out with Shawn Berry and Patrick Atkinson – my two codefendants the jury acquitted! He also provides the information a fourth man was involved – the store’s head security person named “Paul” – who came up with the idea for the robbery, provided inside information of the store’s operation, and whose role was to turn off the store’s surveillance cameras. Johnson also confirms that Shawn and Patrick’s getaway route was east on Oakland Park Blvd., which is where I was waiting for the bus about a mile east of the Uptons store when they picked me up.

Given the facts of my dissimilarity to the perpetrator described by victim/witness at the crime scene and that it is now positively known I wasn’t involved in the attempted robbery, it seems unlikely I would have been charged or convicted if the police

hadn’t conducted the initial show-up identification by the road. It was unduly suggestive and improper for the police to only show me to the witness while I was handcuffed in a setting that made me look guilty.



Based on the new evidence of Johnson’s Affidavit in early 2013 I filed a petition for a new trial. That petition was summarily denied and my appeal to the Florida Court of Appeals is now pending. I can written at:

Korian Dunkley L04493
Union CI
7819 N.W. 228th St
Raiford, FL 32026-4000

Since a prisoner can be moved at any time, you can check my current location by looking up my name – Korian Dunkley – on the Florida Department of Corrections Inmate Search webpage at, www.dc.state.fl.us/activeinmates/

Sedrick Johnson’s Affidavit follows:

GENERAL AFFIDAVIT

STATE OF FLORIDA
COUNTY OF BRADFORD

I, Sedrick Johnson, do hereby swear that the following statement is true and correct and made of my own free will, from my own personal knowledge.

“My closet had been filled w/quite a few skeletons – some were worst than others. However, I had found myself plagued by the one(s) that had remain outstanding. Becoming a born again Christian, ministering & sharing the word of God is my passion. In the process of salvation I’ve learned that it’s better to enter into Heaven maim than to allow any of my members to cause me to sin. (Matt 5:29-30) Also, in asking for forgiveness, I’ve learned that I must first reconcile w/any brother/sister I may’ve slighted before offering my gifts at the altar. (Matt 5:23-24) To my dismay, I realize that some skeletons are physically impossible to remove due to my occupation in time & space for that cause guilt relentlessly at my heart. However, God in his infinite wisdom began paving a redemptive path that would lift the cancerous affects/effects of guilt – un-

beknownst to me.

Between the days of Dec. 25th-26th 1996, I was spending the Holidays at Patrick’s house. At around 11 pm Patrick received a visitor whose name I later learnt was Paul – who was said to be the head security personnel at the Uptons Dept. Store that was located on the corner of University Dr. & Oakland Park Blvd. Paul confided that over the holidays the store would have large sum of money perhaps totaling \$400,000. Paul also suggest that we rob the store & the ideal time to do it would be Thursday the 26th – when the manager arrive to open the store up. He assured us that we needn’t worry about the security cameras because he had switched them off personally.

On the morning of Dec. 26th 1996, we armed ourselves w/two (2) hand guns & a miniature machete. We decided to take two separate cars. Patrick & I rode in a blue Honda Accord, while Shawn followed in a red Nissan. After a short drive we traverse the parking lot of the Uptons Plaza & went to the rear of the store. Shawn parked behind a dumpster & came to the Honda & took the driver’s seat so Patrick & I can get ready, as Shawn drove us to the front of the store & parked. We were late, because we made it around in time to see the manager letting two (2) employees (male & female) into the store – we had missed our chance. However, opportunity reared when another employee arrived gesturing to be let in. At that moment Patrick & I jumped out of the car w/guns in hand flanking either side of the door. The manager opened the door, so we took off in a sprint to catch it before it was closed. At gun point we forced the employee & manage into the store & closed the door behind us.

While in the store Patrick led the manager toward the back of the store where his office was. I covered the employees & had them lay down on the ground so I could watch them. A few minutes later, I hear knocking at the front door. When I looked, I seen it was Shawn gesturing to be let in – I did. At the time he seemed anxious about something. He asked me for the gun, which I gave to him & told me to go to the car & keep the engine running. At that moment a female employee said something that startled Shawn. He pointed the gun at her as if ready to shoot. On that note I took my leave.

Once outside I jogged to the car. The keys were in the ignition, so I started the

Dunkley cont. on p. 5

William Coleman Is In 6th Year Of Hunger Strike Protesting His Innocence Of Rape Conviction

William "Bill" Coleman began a hunger strike in September 2007 to protest his innocence after the Connecticut Court of Appeals affirmed his 2005 convictions for sexual assaulting his estranged wife and related charges. Coleman's hunger strike is believed to be the longest in U.S. history by a prisoner.

Coleman and his wife entered the United States in the late 1980s as British citizens. She became a U.S. citizen and he was in the country on a green card. They married in

1994. Coleman was then able to legally remain in the U.S. because of his wife's U.S. citizenship.

The couple separated and got back together several times. After Coleman's wife became involved with another man, in the fall of 2002 he told her he was going to file for sole custody of their two children and return to England. At the time Coleman's children were living with him full-time. Coleman filed the custody papers in Waterbury County, Connecticut in late September 2002.

Four days after Coleman filed the custody papers his wife went to the police, filed a complaint, and he was arrested and charged with Trespass (living in the family home), Larceny (using his wife's ATM card) and

Threatening Behavior (for protesting his arrest). After Coleman was released on bail his wife complained to the police for the first time that he had raped her shortly before he filed for custody. No medical examination of her was conducted and there was no police investigation into her allegation. Coleman's subsequent charge of sexual assault in a spousal relationship was based solely on his wife's accusation. Coleman claimed his wife fabricated the rape claim as a lever to ensure she would get custody of their children.

The Coleman's were divorced in August 2004. To help resolve the contested child custody a family relations counselor investigated the Coleman's for 15 months. Her

Coleman cont. on p. 6

Dunkley cont. from p. 5

car & pulled up along the side of the store w/the engine running. Moments later I seen Shawn & Patrick speed walking. They both hopped in, & I proceeded to the back of the store so we can get Shawn's car. Once there, they both got out. Patrick told me to take the second getaway route while they take the first, & to meet back at the house. I left going south on University Blvd while Shawn & Patrick went east on Oakland.

Back at the house, I waited about two & a half hours for Shawn & Patrick to arrive. They never did. Later I learned that Patrick & Shawn were caught along w/ a friend of theirs whose name I learnt years later as Korian Dunkley.

On the morning of Aug. 10th 2012, God proved to be mighty & faithful in allowing all things to work together for the good to those that love him & are called according to his purpose (Rom 8:28). On said date there was a mass shake down on the wing in which I was housed. I was jarred out of my morning prayer & meditation when I heard the

name Korian Dunkley. In all thy ways acknowledge God & he shall direct they path (Prov. 3:6) Hearing this prisoner name, I quickly infer that God presented me this long awaited opportunity to life this prodigious burden.

I immediately wrote my family & had them look up Korian Dunkley to find out whether there was others that went by the same name. I was blessed to find that the name was unique. The next dilemma I faced was how do I approach a man that has spent sixteen years of his life innocently serving time vicariously for some one he never knew? The answer came when I consulted the law clerks & legal services that offer help & answer legal questions for pro-se litigants.

With the joy of the Lord, I wrote this Affidavit Confession, got it notarized at the institution & had it sent to Korian Dunkley. He doesn't know me, & I doubt he was aware that there was a third party that he was charged, tried & sentenced for in that crime. Being cohorts of Patrick & Shawn I attended the trial. AT that time I thought it was a blessing when Patrick & Shawn was

acquitted & Korian found guilty in my stead. "For what is a man profited if he shall gain the whole world and lose his soul? Or what shall a man give in exchange for his soul?" (Matt. 16-26) I will give NOTHING in exchange – because that burden has been lifted & I feel truly blessed!

It is my most ardent prayer & hope that this confession aid Korian in procuring his freedom. "Who the Lord has made free, he's free indeed." (Jn 8:36)

Under penalties of perjury, I declare that I have read the foregoing Affidavit and the facts stated herein are true and correct in accordance with §92.525 Florida Statutes (2011)

By: Sedrick Johnson, 12/3/2012

Sedrick Johnson's signature was notarized by Florida notary Randall R. Chism.

Shawn Berry and Patrick Atkinson fled the Up-ton's store at the intersection of University Dr. & Oakland Park Blvd. (Green bubble on left) and drove east for a mile where they picked Korian Dunkley at a bus stop (Green bubble on right).



Coleman cont. from p. 5

report to the judge stated in part: “The alleged sexual assault remains a he-said, she-said situation, as Ms. Coleman did not go for a medical exam subsequent to the alleged abuse. It remains difficult to ascertain which client is actually telling the truth.” The judge expressed similar skepticism about the truthfulness of the vague allegations by Coleman’s wife.

Coleman passed a lie detector test that the assault never happened – but it wasn’t admissible as evidence during his February 2005 trial. He also passed a psycho-sexual test administered by Dr. Joseph J. Plaud, but the findings were not used in Coleman’s defense by his lawyer. The case against Coleman, 45, began and ended with his wife’s accusation. Waterbury police officers testified that they did not conduct any investigation into the rape allegation and there was no medical examination. Nevertheless, after deliberating four days the six-person jury convicted Coleman of sexual assault in a spousal relationship and several related charges.

During Coleman’s sentencing hearing he accused his wife of fabricating the charge and the prosecutors of pursuing his case to prevent a lawsuit for his false arrest, “The system does not work,” he said. “It fails the innocent and, in cases like this, it fails the children.” The judge sentenced him to 15 years in prison with the sentence suspended after eight years. His maximum discharge date was December 30, 2012.

Two weeks after the Connecticut Court of Appeals affirmed Coleman’s convictions in September 2007, he began a hunger strike to protest his innocence and what he believed was Connecticut’s broken and corrupt criminal legal process that can be manipulated to serve the interests of a civil litigant – such as his wife did in their custody dispute.

In January 2008 the Connecticut Department of Corrections obtained a temporary injunction to force feed Coleman if they deemed it necessary for medical reasons. The Connecticut ACLU argued on Coleman’s behalf that as a competent person he has the right to refuse food as a form of exercising his first amendment right to political speech. During the hearing Coleman testified he wouldn’t begin eating again, saying, “I’m not going to wait for the state of Connecticut to dole out truth and justice.” The judge that granted the temporary injunction told Coleman his hunger strike



William Coleman before he began his hunger strike. (www.billcolemaninnocentmanwro ngfullyconvicted.webs.com)

Without notice, on October 22, 2008 the DOC administered Coleman’s first forced feeding. DOC employees forcibly strapped Coleman’s arms and legs to a table and shoved a tube down his nasal passage into his stomach. Surveillance cameras were turned off during the procedure which was carried out incorrectly and the tube “kinked.” Coleman described it as the “worst pain of his life” that was “ten times worse than getting a tooth pulled without a sedative.” The tube was withdrawn and a second tube was inserted. Afterwards he sneezed up blood. He received no medical treatment after the episode.

In February 2009 a hearing was held to determine if the DOC would be granted a permanent injunction. Coleman read a “Statement of Protest” into the record that [stated in part](#):

“I, Bill Coleman, in September 2007, stopped eating solid food as a form of protest. I am protesting a broken judicial system that is incapable of providing justice as well as protesting the State of Connecticut assisting in the abuse of my children. The system has failed my children and me and I have communicated this in several forums, including in court. My case is not an isolated incident; countless others have been subjected to the injustice of the judicial system. Innocent people do not belong in prison and I now just want to be left alone to protest.”

A permanent injunction [was granted](#) in May 2009 allowing the DOC to force feed Coleman at its discretion.

Coleman appealed and the Connecticut Supreme Court issued its unanimous (7-0)

wouldn’t draw “any more attention than you’ve already received to date.”

Coleman maintained his strength by drinking water, juice, and some milk. However, in September 2008 on the one-year anniversary of begin-

ning his protest Coleman stopped taking any nutrition, including water. The DOC responded by administering a saline drip solution twice a week. During the first thirteen months of Coleman’s protest he lost half his body weight – going from 250 to 128 pounds.

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29-page ruling on March 13, 2013 affirming the granting of the permanent injunction to the DOC allowing the forcible administration of artificial nutrition and hydration to Coleman. In [Commissioner Of Correction v. William B. Coleman](#), No. SC18721 (CT Sup Ct, 3-13-2013) the Court specifically denied Coleman’s three claims, ruling: The permanent injunction does not violate his state common-law right to bodily integrity; The permanent injunction does not violate his first amendment right to free speech and his fourteenth amendment privacy or liberty interests in being free from unwanted medical treatment under the United States constitution; and the permanent injunction is not prohibited by international law.

So Coleman continues his hunger strike that began more than six years ago, and the Connecticut DOC can forcibly feed him whenever it deems it necessary.

The Connecticut Supreme Court’s ruling overshadowed another significant issue: Coleman remains imprisoned even though his sentence expired on December 30, 2012. Based on Coleman’s insistence he is innocent and his refusal to agree to register as a sex offender upon his release, an arrest warrant was issued for him that took effect upon expiration of his sentence. Coleman remained in the custody of the Connecticut DOC even though as a non-U.S. citizen felon he was scheduled to be released directly to the custody of Immigration and Customs Enforcement in Massachusetts for deportation proceedings to England. Deportation proceedings cannot begin until the State of Massachusetts releases Coleman to the federal ICE.

Coleman’s federal habeas corpus petition was [dismissed without prejudice](#) in June 2012 so he could return to state court and exhaust his actual innocence claim and his claims related to constancy of accusation testimony at trial.

Although he has completed his prison sentence for his 2005 convictions and he hasn’t been formally charged with refusing to register as a sex offender, the 52-year-old Coleman is currently incarcerated on an arrest warrant at the MacDougall-Walker prison in Suffield, Connecticut. He can be written at:

William Coleman 305106
MacDougall-Walker CI
1153 East Street, South
Suffield, CT 06080

Coleman cont. on p. 7

Barry Beach's Murder Conviction Reinstated By The Montana Supreme Court

The Montana Supreme Court reinstated the 1984 murder conviction of Barry Beach on May 14, 2013. By a 4 to 3 vote, the Montana Supreme Court ruled that District Court Judge E. Wayne Phillips abused his discretion when in November 2011 he vacated Beach's conviction as a miscarriage of justice based on new evidence supporting his actual innocence. Beach, who had been freed on his own recognizance by Judge Phillips in December 2011, was taken into custody the day after the court's ruling.

In January 1983 Beach was living with his father in Louisiana when he was arrested on a misdemeanor charge of contributing to the delinquency of a minor. Detectives in the area were trying to solve the abduction and murder of three young women. The detectives learned that Beach was from Poplar, Montana where the 1979 murder of 17-year-old Kimberly Nees was unsolved. After being interrogated for several days without a lawyer Beach confessed to the three Louisiana murders and Nees' murder. After his interrogation Beach recanted his confessions as forced by the detectives threatening



Barry Beach during hearing on August 1, 2011 in Lewistown, MT (KTVO-TV Billings, MT)

him with the electric chair if he didn't confess. Beach's interrogation wasn't video or audio-taped and the detectives denied they threatened him.

Before Beach could be charged with the three Louisiana murders evidence was discovered conclusively proving his confessions were false, and other men were charged with those crimes. However, Beach was charged with Nees' murder and extradited to Montana.

During Beach's 1984 trial the prosecution didn't introduce any physical, forensic or eyewitness evidence linking him to Kimberly Nees' murder, and there was crime scene evidence that excluded him, including a bloody palm print found on the pick-up Nees was driving that didn't match either her or Beach. To convict Beach of deliberate murder the jury relied on the prosecution's key evidence of his recanted confession to Nees' murder, which had a number of inconsistencies with the crime scene and details of Nees' murder. Beach was sentenced to 100 years in prison.

Beach's convictions were affirmed on direct appeal, and his state and federal habeas petitions were denied.

In 2008 lawyers working with [Centurion Ministries](#) filed a Petition for Postconviction Relief that requested a new trial based on new evidence of Beach's actual innocence. Key new evidence was by 11 witnesses who didn't testify at his trial. Several of those witnesses had evidence identifying that Nees' killers were four women. One of Beach's new witnesses told a police officer around the time of Nees' murder that he saw a number of girls in the truck Nees' was driving that night headed to the park where her body was found. Beach's trial lawyer was not told about that witnesses statement.

An evidentiary hearing [ordered in 2009](#) by the Montana's Supreme Court began on August 1, 2011 in Lewistown, Montana. During that hearing all of Beach's witnesses with new evidence testified. Beach filed his post-conviction petition after the 5-year statute of limitations had expired, so a key issue for Judge Phillips to decide was if the time limit could be waived based on Beach's new evidence establishing his actual innocence.

On November 23, 2011 District Court Judge E. Wayne Phillips filed [his written ruling](#). Judge Phillips found that the evidence by Beach's witnesses hadn't been heard by the jury at trial, that due diligence had been exercised in discovering it, that all 11 of Beach's new witnesses were credible, and his new evidence was sufficient to establish by clear and convincing evidence that no reasonable juror would find Beach guilty beyond a reasonable doubt if they heard their testimony. Judge Phillips ruling explained in detail why he found the witnesses credible and why their new evidence supported a new trial for Beach.

Judge Phillips took into consideration Beach's disputed confession [in ruling](#) "the totality of the evidence is clear and convincing enough to rule that Mr. Beach has certainly opened the actual innocence gateway sufficiently enough to walk through the miscarriage of justice exception toward a new trial. ... It is hereby Ordered that Beach's Petition for Post Conviction Relief is not time barred, the Petition is Granted, and Mr. Beach is Granted a new trial on the charge of the murder of Kim Nees." (29-30)

Two weeks later Judge Phillips ordered Beach's conditional release on his own recognizance.

The Montana Attorney General's Office appealed Judge Phillips ruling granting Beach a new trial and his release. Jim McCloskey, founder and director of Centurion Ministries that began investigating Beach's case in 2000, [described the efforts](#) of the AG's Office to keep Beach in prison and to reinstate his conviction as a "sin against humanity."

On May 14, 2013 the Montana Supreme Court issued [its ruling](#) that addressed a single issue: "Did the District Court err by concluding that Beach was entitled to a new trial because he had demonstrated his actual innocence?" In *Montana v. Barry Allan Beach*, 2013 MT 130 (MT Sup Ct, 5-14-2013) the court ruled by a majority 4 to 3 vote the District Court had erred and reinstated Beach's conviction. The Court's 53-page opinion concluded:

"The District Court made the mistake, deliberately, of listening to the new evidence, and failing to closely consider the old evidence. Thus, no matter how compelling the District Court found the new evidence to be, it committed error as a matter of law by refusing to consider that evidence together with the evi-

Coleman cont. from p. 6

A website with information about William Coleman's case is, www.billcolemaninnocentmanwrongfullyconvicted.webs.com

[Click here to read](#) "William Coleman Starves Claiming Innocence of Raping Wife" published in *Justice Denied* Issue 42.

[Click here to read](#) William Coleman's "Statement of Protest" that he read during his testimony on February 10, 2009.

Source:

[Commissioner Of Correction v. William B. Coleman](#), No. SC18721 (CT Sup Ct, 3-13-2013) (Affirming lower court's permanent injunction allowing DOC force feeding.)

[Coleman v. Semple](#), No. 3-11cv512 (JBA) (USDC CT), 6-28-12 (Order granting Respondent's motion to dismiss habeas petition without prejudice.)

[Lantz v. Coleman](#), 978 A. 2d 164 (CT. Super. Ct. 2009) (Permanent injunction allowing DOC force feeding.)

[State v. William Coleman](#), 103 Conn.App. 508, 930 A.2d 753, cert. denied, 284 Conn. 928, 934 A.2d 244 (2007) (Affirming conviction)

[Hunger-Striking Inmate Refuses To Register As Sex Offender](#), *CtNewsJunkie.com*, April 25, 2013

"William Coleman Starves Claiming Innocence of Raping Wife" published in *Justice Denied*, Issue 42

Bill Coleman's "[Statement of Protest](#)", *Justice Denied*, Issue 42

Beach cont. on p. 8

Beach cont. from p. 7

dence presented during the 1984 trial to determine whether its impression of the testimony could be sustained in light of the record as a whole. After a review of all the evidence, we conclude that Beach did not provide reliable evidence of his actual innocence that displaced the trial evidence and thus his conviction. (§179)

Applying the proper standard of review to the new evidence offered by Beach, we determine he has failed to sustain his burden of demonstrating either a free-standing claim or a gateway claim of “actual innocence.” The District Court’s order is reversed. Beach’s petition for postconviction relief is denied and dismissed.”

The three dissenters took strong exception to what it considered the majority’s erroneous assessment of the District Court’s ruling:

“The District Court found the testimony of each of Beach’s witnesses to be credible and believable. The District Court observed the demeanor of each witness presented by Beach. The District Court carefully detailed what it found credible about each witness. The District Court considered the fact that most witnesses had no connection to the town of Poplar, Beach, or Nees, and accordingly, had no motive to lie. The District Court, as the trier of fact, sits in a better position to observe the witnesses and determine credibility than this Court. The District Court has presided over at least 35 criminal trials and has experience gauging the credibility of witnesses. I cannot say from this vantage point that the District Court’s determination regarding the witnesses’ credibility and believability rises to the level of clearly erroneous. (§142)

The District Court next weighed the evidence that the State presented at Beach’s original trial against Beach’s new evidence to determine whether Beach had demonstrated that no reasonable juror would find Beach guilty beyond a reasonable doubt. ... The District Court stated, “[i]t is [Beach’s] confession that constitutes the entirety of the State’s argument. That confession was considered by this court in its Order.” (§143)

Beach’s confession constituted “the focal point of this whole inquiry.” The State conceded at Beach’s trial that no reliable physical evidence retrieved from the crime scene tied Beach to the murder. The District Court’s statement that it had compared the evidence at the hearing against



Kimberly Nees

Beach’s confession indicates that the District Court properly weighed the State’s evidence from Beach’s 1984 trial against the new evidence presented at the hearing. (§144)

The [district] court’s weighing of the evidence led it to conclude that no need existed for Beach to have a new post-conviction relief hearing based on the fact that Beach had demonstrated his free standing actual innocence claim by meeting the higher burden of persuasion. (§145)

This ruling marks what likely will be the final chapter in the saga of Barry Beach. We oversee a criminal justice system that seeks to resolve a defendant’s guilt through processes created and administered by humans. Humans, by nature, are fallible and the processes that humans create share this same fallibility. ... The District Court scrupulously attempted to comply with its mandate from this Court to consider Beach’s alleged new evidence. I cannot say that the District Court’s rulings rise to the level of abuse of discretion, and, accordingly would affirm the order of the District Court. (§146)

After the Montana Supreme Court issued its ruling McCloskey released a statement on behalf of Centurion Ministries in which he said: “This decision came as a complete and utter shock to all concerned. We are absolutely stunned and disgusted by this turn of events. No one saw this coming.”

[Click here to read](#) the Montana Supreme Court’s majority ruling in *Montana v. Barry Allan Beach*, 2013 MT 130 (MT Sup Ct, 5-14-2013).

Having exhausted his options to overturn his conviction in state court, on September 13, 2013 Barry Beach filed a 413-page application for commutation of his sentence with the Montana Board of Pardons and Parole. [Click here to read](#) the application.

Previous *Justice Denied* articles about Beach’s case are: “[Barry Beach Granted New Trial](#) In 1984 Murder Conviction,” and “[Barry Beach Released On Bail](#) After 29 Years Imprisonment.”

Barry Beach’s website with extensive information about his case is, <http://montanansforjustice.com>.

Barry Beach can be written at:
Barry Beach #21520
Montana State Prison
700 Conley Lake Drive
Deer Lodge, MT 59722

Sources:

[Barry Allan Beach v State of Montana](#), 220 P.3d 667, 2009 MT 398, 353 Mont. 411 (MT Sup Ct, 11-24-2009)

[Barry Allan Beach v. State of Montana](#), No. 1068-C, MT 15th Judicial Dist Roosevelt County, November 23, 2011 (granting Barry Beach a new trial)

[State of Montana v. Barry Allan Beach](#), 2013 MT 130 (MT Sup Ct, 5-14-2013)

[Barry Beach](#), Montana DOC inmate lookup webpage,

Innocents Database Now Lists 4,002 Cases

The [Innocents Database](#) linked to from Justice Denied’s website is the world largest database of wrongly convicted people. It now lists 4,002 cases. All the cases are supported by sources for research. Those sources include court decisions, newspaper and magazine articles, and books.

The [Innocents Database](#) includes:

- 577 innocent people sentenced to death.
- 780 innocent people sentenced to life in prison.
- 1,597 innocent people convicted of murder who were imprisoned an average of 9-2/3 years before their exoneration.
- 565 innocent people convicted of rape or sexual assault who were imprisoned an average of 10 years before their exoneration.
- 530 innocent people exonerated after a false confession by him or herself or a co-defendant.
- 258 innocent people convicted of a crime that never occurred.
- 165 innocent people posthumously exonerated by a court or a pardon.
- 62 innocent people convicted of a crime when they were in another city, state or country from where the crime occurred.
- 1,166 innocent people had 1 or more co-defendants.
- 12% of wrongly convicted persons are women.
- The average for all exonerated persons is 7-1/2 years imprisonment before their exoneration.
- 31 is the average age of a person when wrongly convicted.
- Innocent people convicted in 105 countries are in the database.

[Click here to go to the Innocents Database at, www.forejustice.org/search_idb.htm.](#)

Sexual Abuse Charge Dismissed Against Lucinda Hites-Clabaugh

First-degree sexual abuse charges have been dismissed against Lucinda S. Hites-Clabaugh after the Oregon Court of Appeals overturned her conviction. She was wrongly imprisoned for more than two years.

Hites-Clabaugh was a substitute teacher for a third-grade class in Woodburn, Oregon on May 13 and 14, 2008. (Woodburn is about 30 miles south of Portland.) The day the regular teacher returned a female student told her that while she had been gone a teacher [had touched](#) her inappropriately between the legs." The teacher informed the principal who contacted the State Department of Human Services and the Woodburn Police.

Woodburn Police Officer Potter interviewed the teacher, the principal, the student, and Hites-Clabaugh. Those interviews were the extent of Potter's investigation. Based on Potter's report the Marion County District Attorney charged Lucinda with first-degree sexual abuse.

During Hites-Clabaugh 2009 trial the prosecution's case consisted of testimony by the principal, the teacher, Officer Potter, and the student. She testified a teacher touched her crotch over her clothing for about a minute. When asked, she said she didn't see the person in the courtroom who touched her. So the student didn't identify Lucinda as the alleged perpetrator either by name or in person.

During cross-examination officer [Potter testified](#) "he had no specialized training concerning Marion County's child abuse investigation protocols and little experience involving child sexual abuse cases. He acknowledged that there were protocols in place for such investigations in Marion County, but indicated that ... he was not trained in those protocols."

Based on Potter's testimony about his lack of training and experience in child sexual abuse cases, Lucinda's [lawyer requested](#) that she be allowed to call psychologist [Dr. Kevin McGovern](#) "as an expert on the necessity to use protocols that have been promulgated by the State of Oregon in sex abuse cases." The prosecution objected, and Lucinda's lawyer argued that Potter's testimony about his lack of knowledge and inexperience had opened the door for Dr. McGovern's expert testimony about the im-



portance of following investigation protocols in a case of alleged child abuse. The judge sustained the prosecution's objection and Dr. McGovern wasn't allowed to testify.

Hites-Clabaugh testified she did not inappropriately touch the student and that the incident didn't occur. Numerous character witnesses testified on Hites-Clabaugh's behalf.

No eyewitness or physical evidence was introduced Lucinda's trial that she had touched the student, or if the incident had even happened.

Hites-Clabaugh was convicted of first-degree sexual abuse by the majority 10-2 jury vote allowed by Oregon's Constitution. She was subsequently sentenced to the mandatory minimum of 75 months imprisonment. Lucinda was denied bail pending the outcome of her appeal, and she began serving her sentence after her sentencing hearing in August 2010.

On July 18, 2012 the Oregon Court of Appeals ruled in [Oregon v. Lucinda Hites-Clabaugh](#), No. A-146356 (OR Ct of Appeals, 7-18-2012), that the trial court's exclusion of Dr. McGovern's expert testimony was so prejudicial to Hites-Clabaugh's defense that they overturned her conviction, and remanded her case back to the Marion County Circuit Court:

Here, the defense theory of the case was that the event described by the victim simply did not occur, that the investigating officer was not trained in investigating allegations of child sexual abuse, and that as a result, his investigation was markedly deficient. The excluded evidence went to the heart of defendant's theory of defense. In those circumstances, the exclusion of the evidence was prejudicial.

The 55-year-old Hites-Clabaugh was released on \$5,000 bail on August 30, 2012 after more than two years imprisonment, and on September 24 her felony indictment [was dismissed](#) with the agreement of the Marion County District Attorney. The DA agreed to dismiss the felony charge in exchange for her no contest plea to Class B misdemeanor harassment for an unrelated incident. She was formally discharged from custody after the hearing. After the hearing [her lawyer](#) Mark Geiger told *The Oregonian* newspaper, "This is a huge victory to

go from sex abuse to harassment. We would have preferred a complete dismissal, but you do the best you can."

Justice Denied interviewed attorney Geiger, and when asked about the circumstances of the misdemeanor harassment conviction, he said it was the result of Hites-Clabaugh's use of [Chakra](#) to calm an unruly student -- in a classroom full of students -- by using the healing touch on her forehead and above her breastbone. Geiger said that student was the same one who later told authorities she was sexually touched. Geiger suggested the girl told her parents about the Chakra healing touch, and they may have misconstrued and blown it all out of proportion into the alleged sexual incident that resulted in Hites-Clabaugh's prosecution, conviction and imprisonment.

Geiger said an impediment to Hites-Clabaugh resuming her public school teaching career is the insurance company she used said they won't insure her. If she gets her teaching certificate reinstated it is possible they may reconsider.

Oregon doesn't have a wrongful conviction compensation statute. However, Geiger told *Justice Denied* Hites-Clabaugh's misdemeanor plea agreement doesn't include a stipulation she cannot seek money damages related to her felony conviction for wrongdoing by any responsible government agency or employee.

The Oregon Court of Appeals decision can be read [by clicking here](#).

Detailed information about Lucinda's case is on the [Justice For Lucinda](#) website

The website of Dr. Kevin McGovern & Associates is at, www.forensicpsychs.com/psychologists.html

Visit Justice Denied's Website

www.justicedenied.org

Back issues of *Justice: Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 70 wrongful conviction books, and JD's Videoshop includes many dozens of wrongful conviction movies and documentaries.

Stephanie Lee Matz Acquitted By Appeals Court Of Possessing Gambling Devices

Stephanie Lee Matz was acquitted by the Iowa Court of Appeals which reversed her convictions of unlawfully possessing gambling devices.

Stephanie Matz was the owner and operator of Pharroh's nightclub in Waterloo, Iowa in September 2009 when State authorities discovered during an inspection that she had let the "amusement" device registration lapse on two gaming devices. She was charged with two violations of unlawful possession of gambling devices.

During her District Court bench trial in 2011 the prosecution's case was based on their contention that upon lapse of the "amusement" device registration the devices became "gambling" devices. Matz

didn't deny letting the registrations lapse. However, her lawyer argued there was not sufficient evidence to convict her of unlawfully possessing gambling devices because her amusement devices were not "a game of skill or game of chance" as state law defines a "gambling device," and gambling devices required a different registration under state law.

Matz was convicted on both counts. She appealed on the basis there was insufficient evidence to support her conviction.

On December 12, 2012 the Iowa Court of Appeals reversed Matz' convictions and ordered that a judgment of acquittal be entered on remand to the District Court. The appeals court's ruling [stated in part](#):

Matz argues the machines she owned were "amusement devices," not "gambling devices." The State counters that when Matz allowed the registrations on her machines to lapse, the machines became "gambling devices" ... While appealing at first blush, this argument has a logical fallacy; it assumes that if something is not "x" it must be "y."

The State [] had to show that each machine met the definition of a "gambling device": "a device used or adapted or designed to be used for gambling. ... The

State did not make this showing. At best, the State witnesses established that the machines were "operational" and "functional" after the registration lapsed. There was no evidence that the machines, which previously satisfied the substantive definition of amusement devices, underwent design changes or adaptations to make them gambling devices or that they were used as gambling devices.

Our conclusion that the amusement devices did not spontaneously transform into gambling devices upon a lapse in registration is supported by a complete reading of the amusement device provision. ... If an unregistered amusement device were to lose its status as an "amusement device" upon a lapse in registration, no person could be prosecuted for failure to register the device and subsections (2) and (3) would essentially be meaningless. Such a reading is not reasonable.

We reverse Matz's finding of guilt under section 725.9

and remand for entry of a judgment of acquittal.

[Click here to read the ruling](#) in *State of Iowa v. Stephanie Lee Matz*, No. 2-891, 11-1896 (Iowa Ct of Appeals, 12-12-12).

Matz was granted a liquor license for Pharroh's in November 2007 as its owner and operator when she was 27-years-old. In April 2009 the Waterloo City Council voted [not to renew](#) her annual license when it came up for renewal in November 2009 based on a negative report by the Waterloo Police Department. Matz challenged revocation of her liquor license, but she voluntarily [dropped her appeal](#) in April 2010.

Sources:

[State of Iowa v. Stephanie Lee Matz](#), No. 2-891, 11-1896 (Iowa Ct of Appeals, 12-12-12)

[Waterloo club's gambling conviction overturned](#), *WCF Courier* (Waterloo, Iowa), December 18, 2012

[Pharroh's liquor license up for debate Monday](#), *WCF Courier* (Waterloo, Iowa), April 12, 2009

[City wins 'bar fight' by default](#), *WCF Courier* (Waterloo, Iowa), June 11, 2009

[No last call just yet for troubled bar](#), *WCF Courier* (Waterloo, Iowa), October 6, 2009

[State of Iowa, Department of Commerce](#), Alcoholic Beverages Division, Voluntary Dismissal of appeal by Stephanie Matz, April 8, 2010

Edwin M. Borchard – Convicting The Innocent Available From Justice Denied

Edwin M. Borchard – *Convicting The Innocent and State Indemnity For Errors Of Criminal Justice* has [been published](#) by The Justice Institute/Justice Denied.

Yale University Law School Professor Edwin Borchard was an early pioneer in exposing the causes of wrongful convictions and the inadequacy of compensation for exonerated persons in the United States. This 358-page book includes Borchard's key works *European Systems Of State Indemnity For Errors of Criminal Justice*, and *Convicting The Innocent: Sixty-Five Actual Errors of Criminal Justice*. The Table of Contents is:

Introduction

Chapter 1. Edwin M. Borchard: Pioneer In Analyzing Wrongful Convictions And Advocate For Compensation

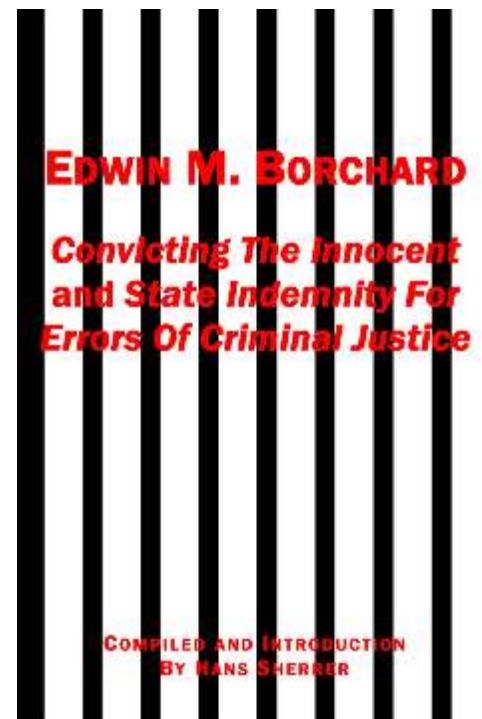
Chapter 2. Edwin Borchard, Law Expert, Dead

Chapter 3. European Systems Of State Indemnity For Errors Of Criminal Justice

Chapter 4. Convicting The Innocent: Sixty-Five Actual Errors Of Criminal Justice

A webpage with information about the book and how to order a single copy for \$16.95, or multiple copies at a discount is at, www.justicedenied.org/edwinborchard.html

Or order the book with the form on age 23.



Appeals Court Acquits Chris von Deutschburg of 1983 Murder That Didn't Occur

The Western Australia Court of Appeals ordered on March 1, 2013 that Chris von Deutschburg's 1983 second-degree murder conviction in Perth, Australia be set-aside and that a judgment of acquittal be entered.

On June 1, 1983 von Deutschburg was 18 and half-starved from being homeless for months in Perth, the largest city in Australia's state of Western Australia. (He was known in 1983 by his birth name of Christian Wilhelm Michael, but to avoid confusion he will be referred to by his current name of Chris von Deutschburg.) On June 1 he burglarized the home of 86-year-old Stavros Kakulas. During the burglary he scuffled with Kakulas before fleeing with some money and a radio.

Eighteen hours after the burglary Kakulas was examined at a hospital in Perth. The doctor determined he had several fractured ribs, and his arm, chest and right eye were bruised. Kakulas wanted to go home, but he gave in to the doctor who insisted that he be admitted. Seven days later Kakulas' condition began to deteriorate and his doctor determined he was bleeding internally. He died on the afternoon of June 8.

Dr. Donald Hainsworth performed an autopsy on Kakulas and determined his direct cause of death was internal bleeding into his intestine from an acute duodenal ulcer.

Von Deutschburg was arrested on June 12, 1983 and indicted on December 5, 1983 for burglary and murder. The murder charge was based on the prosecution's theory he intended to do Kakulas grievous bodily harm, and the scuffle caused mental stress to Kakulas that resulted in the bleeding ulcer that caused his death. That theory was based on a letter dated June 30, 1983 Dr. Hainsworth [wrote to the lead investigating officer](#):

"The direct cause of his death was bleeding into the intestine from acute duodenal ulceration -- i.e. a 'stress ulcer'. This ulcer had arisen after the injuries and was the result of the deceased having undergone physical & psychological stress. ... injuries which, of themselves would not have been fatal." (emphasis in original)

Von Deutschburg pled guilty to the bur-



Chris von Deutschburg
(PerthNow, 2006)

Kakulas developed his fatal ulcer within a couple days of his death as a result of the stress the burglary caused him. They also presented evidence of von Deutschburg's admission to the burglary.

Von Deutschburg testified and admitted to the burglary and stealing money and a radio, and that he hit Kakulas a few times on the arm. He also testified he had no intention to harm Kakulas and that he only hit his arm a few times. Von Deutschburg's lawyer didn't present a medical expert to contest Dr. Hainsworth's testimony.

In summing up the case for the jury the trial judge emphasized that the [prosecution's argument](#) supporting the murder charge was "The medical evidence from Dr Hainsworth, and I agree that it is an opinion which the doctor has given--is that this form of duodenal ulcer was occasioned by the stress of the attack."

Three days after his trial began von Deutschburg was convicted of second-degree murder. He was sentenced to life in prison at hard labor.

Three years after his conviction Von Deutschburg obtained new medical evidence by Dr. Alistair Cowen who stated in an Affidavit dated November 4, 1986: "Is it likely beyond any reasonable doubt that the ulcer described by Dr. Hainsworth was a stress ulcer due to the injuries described by him at post mortem? The answer in my view is unequivocally NO." He also obtained similar new evidence by Dr. Barry Marshall who stated in an Affidavit "As a result of my own research and findings . . . I strongly believe that all statements to the effect that the ulcer which caused Mr. Kakulas's death was caused by stress are medically incorrect." (Source: Unjust McGinty website, www.geocities.com/chris_it_tech/index.html (2-10-2006), no longer available online.) It isn't known why, but von Deutschburg didn't pursue a petition to challenge his conviction.

Von Deutschburg was released on parole in early 1990 after almost 7 years of imprison-

ment from the time of his arrest in June 1983. A few months after his release he changed his legal name to Chris von Deutschburg.

ment from the time of his arrest in June 1983.

A few months after his release he changed his legal name to Chris von Deutschburg.

Dr. Cowen wrote in a March 12, 1992 letter to von Deutschburg:

"Mr. Chris von Deutschburg has written to me asking that I reaffirm my previous views, namely those stated in my Affidavit to the Supreme Court of Western Australia. I believe the medical evidence presented at Chris Michael's trial was quite erroneous, that there is absolutely no doubt that the vast majority of medical opinion would now support that the medical evidence was erroneous, and it is most likely that Christopher Michael would not have been convicted of murder had appropriate and correct medical evidence been tended.

I have been involved in this matter over a number of years and it is certainly in my view the worst miscarriage of justice based on erroneous medical evidence that I have observed." (Source: Unjust McGinty website, www.geocities.com/chris_it_tech/index.html (2-10-2006), no longer available online.)

In 1992 three other medical experts in Australia agreed with Dr. Cowen's assessment that the "ulcer" evidence presented during von Deutschburg's trial had been erroneous. However, again for reasons unknown, von Deutschburg didn't pursue a petition to challenge his conviction.

The jury foreman Cliff Boer learned about the new medical evidence and wrote von Deutschburg in a letter dated April 27, 1992:

"The defense attorney questioned whether or not the pathologist (Dr. Hainsworth), was sure of his diagnosis, but did not pursue with any vigor after the response was 'yes'."

"We were fairly unanimous that if there had been even a single medically qualified individual express some doubt, (possibly even a General Practitioner would have sufficed), we would have been compelled to bring down a verdict of NOT GUILTY." (Source: Unjust McGinty website, www.geocities.com/chris_it_tech/index.html (2-10-2006), no longer available online.)

The basis of von Deutschburg's conviction was severely undermined by the [awarding of the](#) Nobel Prize in Physiology or Medicine on October 3, 2005 to Dr. Marshall and Dr. Robin Warren for their research proving

Deutschburg cont. on page 12

Deutschburg cont. from page 11

that ulcers are caused by bacteria.¹ This was the same Dr. Marshall who provided an Affidavit to von Deutschburg in 1986. Dr. Marshall's research directly supported that Kakulas died from natural causes and he would have died when he did even if von Deutschburg hadn't burglarized his house.

Dr. Marshall's Noble Prize created media interest in von Deutschburg's case, and *The Sunday Times* in Perth published an article about it on October 23, 2005 that explained the medical evidence establishing von Deutschburg didn't murder Kakulas.

In December 2005 von Deutschburg set-up a website called "Unjust McGinty" that provided details about his case.² He later added a page "Perjury and other Crimes" detailing the 'criminal' incompetence of his trial lawyers and perjury by several police officers during his trial.³ When contacted by Justice Denied in August 2006 that his website was down Von Deutschburg stated, "I removed it after I felt threatened."⁴

Von Deutschburg was able to find a law firm to take his case *pro bono*, and in 2009 they filed a petition with the Attorney General for Western Australia seeking to quash his conviction as a miscarriage of justice under the Royal Prerogative of Mercy. The Attorney General did not act on the petition until Dr. Marshall wrote a letter to the Attorney General dated April 4, 2012 [that stated in part:](#)

"There is no likelihood that his (Mr. Kakulas's) injuries either worsened or contributed to the duodenal ulcer in question. My answers do not necessarily depend on my opinion that the duodenal ulcer already existed before the assault on 1st June 1983. The duodenal ulcer may have existed before then or may have developed after 1st June 1983. Obviously a duodenal ulcer is a recurring condition and in 1983 the aetiology of these recurrences was completely unknown. Therefore persons with duodenal ulcer disease have ulcers coming and going throughout their life. The injuries sustained by Mr. Kakulas did not contribute to the development, or accelerate the development of his duodenal ulcer."

Dr. Marshall's prestige in the world medical community was too much for the Attorney General to ignore. Three weeks after receiving Dr. Marshall's letter he [referred von Deutschburg's](#) petition to the Western

Australia Court of Appeals "for the whole case to be heard and determined as if it were an appeal by the appellant against the conviction for murder."

After his petition case was referred to the appeals court von Deutschburg [told a reporter](#) with *The Australian* newspaper, "During this crime I struggled with an old man. It was a crime without justification and I am deeply remorseful. The old man said 'Goodbye, son' as I left." Accepting his punishment for the burglary he added, "For the past 28-plus years I have experienced imprisonment, months of community service on parole, and years of work for the dole, as no one will employ a convicted murderer. For over 28 years I have been punished for a crime I did not commit."



Dr. Barry Marshall
(University of Virginia)

Based on the medical opinions Dr. Marshall stated in his letter, in June 2012 the Office of the Director of Public Prosecutions requested Dr. Clive Trevor Cooke to provide an opinion about Kakulas' death. Dr. Cooke is Chief Forensic Pathologist in the Forensic Pathology section of [PathWest Laboratory Medicine](#) in Perth. Dr Cooke and a colleague, Dr. Priyanthi Kumarasinghe, a Gastroenterology Pathologist employed by PathWest, [independently concluded](#) "that the duodenal ulcer showed 'features of chronicity, and therefore existed [before](#) the assault which occurred seven days prior to ... Mr. Kakulas' death'" (emphasis in original).

Dr. Marshall provided an Affidavit dated July 31, 2012 that [stated in part:](#)

65. It is my opinion that the injuries sustained by Mr Kakulas on 1 June 1983 did not contribute to the development, or accelerate the development, of Mr Kakulas' ... duodenal ulcer.

66. The injuries sustained by Mr Kakulas on 1 June 1983 did not worsen Mr Kakulas' duodenal ulcer because the injuries were not especially severe. In fact he did not want to be admitted to hospital initially and after that was receiving excellent care.

67. Further, the injuries sustained by Mr Kakulas on 1 June 1983 did not contribute to the development, or accelerate the development of the bleeding of the duodenal ulcer because they were not of a severity to cause an ulcer.

The appeals court held a hearing on February 5, 2013 during which Western Australia's Director of Public Prosecutions Joe

McGrath [conceded that](#) von Deutschburg's appeal should be allowed.

The Court of Appeals issued [it's ruling](#) on March 1, 2013 in *Von Deutschburg v. The Queen* [2013] WASCA 57. They acknowledged that under the applicable statute and the court's precedents they could consider "the whole case," including "the whole of the evidence properly admissible, whether 'new', 'fresh' or previously adduced, in the case against, and the case for the appellant." (Quoting *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125) That included the un rebutted new medical evidence supporting that Kakulas' death was from a natural cause. The ruling concluded:

"... the only reasonable conclusion open is that Professor Marshall's and Dr. Cooke's evidence raises such a doubt that the appellant should not have been convicted of murder. If the jury had heard Professor Marshall's and Dr Cooke's evidence, in addition to the evidence adduced at trial, it must necessarily have entertained a doubt about the appellant's guilt. The medical evidence before this court is incapable of proving beyond reasonable doubt that the appellant's assault upon Mr Kakulas caused or materially contributed to his death. A miscarriage of justice occurred at the trial."

The Court ordered that von Deutschburg's conviction for murder be set aside and a judgment of acquittal be entered. The acquittal was more than 29 years after his conviction.

The jury foreman Boer was present when the ruling was announced, and he [told a reporter](#) the ruling lifted "a great weight off my shoulders" because the jurors "wrongly convicted" von Deutschburg. He said the jury had unanswered questions, but it was compelled to convict him by the judge's instruction to only consider the evidence presented at trial.

Von Deutschburg is now 48 and lives in a city in Victoria, Australia. After his acquittal he issued a statement that [stated in part:](#)

"Today I welcome the Court of Appeal making a decision in this matter ... in 1983 it took just three days to find me guilty, but some 30 years to finally accept my innocence. I served a life imprisonment with hard labour sentence, including years within Fremantle Prison, all based upon DPP trial evidence that simply never existed. This injustice spanning almost three decades has dev-

Deutschburg cont. on page 13

Josephine Greensill Acquitted Of Indecent Assaults Allegedly Committed in 1979

Josephine Mary Greensill has been acquitted on appeal of indecently assaulting two 8-year-old boys in 1979 who were students at the school where she taught near Melbourne, Australia. She was released after 2 years and 4 months of imprisonment.

In 1979 Greensill was a 28-year-old third-grade teacher at the Bayswater Primary School in Bayswater, a suburb of Melbourne. Her name at the time was Josephine Sumpton.

Twenty-eight years later in 2007, two of her



Josephine Greensill after her release from prison on November 22, 2012. (Joe Armao, *The Age* (Melbourne, Australia))

former students accused her of sexually assaulting them in 1979 when they were 8 years old. They are only identified as “Jim” and “Dan.”¹ The police statements of Jim and Dan were the basis of the indecent assault charges filed against Greensill.

Greensill’s trial began in May 2010. Jim and Dan testified that in 1979 she invited them to spend the night in a tent in the backyard of her house on a Friday or Saturday night, after a big bonfire party at a local park. They testified that after they went to sleep Greensill came into the tent while her husband and children were in the house. They testified that over a long period of time she masturbated them individually and at the same time, and that she also had oral sex and intercourse with them. Dan testified that during this orgy he told Greensill, “I don’t want to do this. I want to go and play.” Dan also testified that while Jim and Greensill were together in the tent he saw her husband when he went into the house and got a drink of water. The next day she took them home.

Relatives of Jim testified he had never mentioned that anything of a sexual nature had ever occurred between him and Greensill. Jim’s older sister testified that when she was 14 she babysat the Greensill’s children on several occasions and that Jim was usually there with her. The police statement of Jim’s ex-wife was read into evidence, and she made no mention he ever told her that he and Dan had spent the night at Greensill’s house and that they had sex with her. What she did state is that after they were married in 1995 [Jim told her](#) Greensill “had done wrong by him and had tried to frame him with a theft of money,” and that “from time to time [Jim] would say things to the effect of, ‘Maybe I should track this teacher down, take her to court, sue her.’”

Greensill’s husband worked for the railroad and died in 2007 as the result of an [accident at a train](#) crossing. There was evidence that Jim, who also worked for the railroad, had learned of the accident that would result in a death payout to Greensill. It was shortly after the accident that Jim contacted the police in October 2007 and made his complaint about the alleged sexual assaults in 1979.

Both Jim and Dan testified they had no contact from 1979 until after they gave their

police statements in 2007. However, Detective Ian Brown testified that after Jim gave his police statement he gave him Dan’s telephone number. Det. Brown testified it was only after Jim and Dan talked that Dan gave his statement.

Greensill, a mother of five, didn’t testify. Her defense relied on her denials in her police statement the alleged sleep over and sexual activity never occurred. Although Jim and Dan acknowledged Greensill’s husband was in the house during the orgy they described, because of his death she didn’t have the benefit of his testimony about the night of the alleged incident.

There was no evidence the alleged crimes occurred except for the testimony of Greensill’s two accusers, but after an 11-day jury trial she was convicted on June 9, 2010 of committing nine counts of indecent assault against Jim and Dan.

Greensill was taken into custody on July 21, 2010. During her sentencing hearing on August 10, 2010 her lawyer stated in response to the judge asking if Greensill had any remorse: “I say nothing about remorse. There’s no admission of guilt, there’s no remorse.” The judge said she had “poisoned and eroded” much of the two men’s lives and sentenced her to 5 years in prison. He also ordered that when released she register as a sex offender for life.

Greensill’s appeal argued that her conviction was a miscarriage of justice, based on both the trial evidence that wasn’t sufficient to support her conviction, and new evidence she obtained after trial. Key new evidence was that after her conviction Jim filed a victim compensation claim and was paid \$62,735², which directly conflicted with [his testimony](#) during cross-examination, “I want none of your client’s money”, and that he “just wanted the truth to come out.” Other key new evidence was that when interviewed by psychiatrist Professor Lorraine Dennerstein to determine damages for his compensation claim, Jim “[gave no description](#) to Professor Dennerstein of penile-vaginal penetration having taken place. In stark contrast, however, [Jim] told Professor Dennerstein of other incidents [as a minor involving women other than Greensill] where he claimed that penile-vaginal penetration had occurred.” Greensill’s appeals lawyer argued the new evidence established Jim had a financial motive to fabricate the incident, and that since his testimony about his alleged intercourse with Greensill was a centerpiece of the prosecu-

Deutschburg cont. from page 12

astated my life.

Thank you to Professor Marshall for his medical work of healing the sick, and saving the life of an innocent person persecuted by the State for some 30 years.”

Von Deutschburg also thanked jury foreman Boer for supporting him “all these decades and for visiting me while I was in Fremantle Prison, (and) RP and all those who have variously helped over these past 30 years.”

[Click here to read](#) the March 1, 2013 ruling in *Von Deutschburg v. The Queen* [2013] WASCA 57.

Endnotes:

- 1 In March 2013 Dr. Barry James Marshall is a Clinical Professor of Medicine and Microbiology at the University of Western Australia in Perth, and a Consultant Gastroenterologist at Sir Charles Gairdner Hospital. He is also the Co-Director of the Marshall Centre for Infectious Disease Research and Training.
- 2 Email from Chris von Deutschburg to Hans Sherrer at Justice Denied on December 4, 2005.
- 3 Email from Chris von Deutschburg to Hans Sherrer at Justice Denied on February 12, 2005.
- 4 Email from Chris von Deutschburg to Hans Sherrer at Justice Denied on August 29, 2006.

Sources:

- [Von Deutschburg v. The Queen](#) [2013] WASCA 57
[WA Nobel Prize winner Barry Marshall](#) reopens 1983 murder case, PerthNow (Perth, AUS), May 14, 2012
[Murder charge appealed on new medical evidence](#) — 28 years on, *The Australian* (Sydney), May 15, 2013
[DPP concedes ulcer ‘murder’ man](#) Chris von Deutschburg should be cleared, PerthNow (Perth, AUS), February 5, 2013
[Chris von Deutschburg cleared](#) of 1983 ‘ulcer murder’, PerthNow (Perth, AUS), March 1, 2013
[Dr. Barry Marshall](#) webpage, Nobelprize.org

Greensill’s cont. on page 14

Greensill's cont. from page 13

tion's case, his omission of it from his interview by Dr. Dennerstein in preparation for his compensation claim was additional evidence he fabricated the incident.

After a hearing on November 22, 2012, Victoria's Court of Appeals quashed Greensill's convictions as a miscarriage of justice, acquitted her of all charges, and ordered her immediate release from custody. The 61-year-old Greensill was released from prison after 2 years and 4 months of imprisonment.

Three weeks after Greensill's release, the Court released its 39-page ruling explaining why it acquitted her. In [Greensill v The Queen](#) [2012] VSCA 306 (December 13, 2012) the appeals court detailed nine key areas that made Greensill's convictions "unsafe and unsatisfactory" requiring her acquittal:

First, "the unlikelihood of the appellant interfering with two boys of eight years of age in a tent in the backyard of her premises while her husband (and children) were nearby. ... [that] involved masturbation, fellatio and sexual intercourse over a protracted period of time..."

Second, "the implausibility that eight year old boys would be capable – in the way graphically described by both [Jim and Dan] in their evidence – of completing full sexual intercourse with an adult female."

Third, "that [Jim and Dan] produced semen at the time of the sexual activities in the tent. This suggestion runs counter to common experience with respect to boys of this age."

Fourth, "the evidence discloses a real likelihood that [Dan and Jim] collaborated, and a real possibility of concoction."

Fifth, "there is independent evidence flowing from his ex-wife that [Jim] bore [Greensill] real animosity for some slight occurring in his childhood."

Sixth, "there is evidence that [Jim] may have had a financial motive in making a complaint."

Seventh, "there is the content of the Professor Dennerstein report, where [Jim] omits any reference to penile-vaginal penetration as part of the tent incident."

Eighth, "there are a number of inconsistencies between the accounts of the two complainants with respect to the tent incident and circumstances closely surrounding it."

Ninth, "there is the significant forensic

Oregon Supreme Court Sets New Eyewitness Guidelines In Overturning Samuel Lawson's Murder Conviction

In unanimously overturning the aggravated murder convictions of Samuel Lawson, the Oregon Supreme Court established comprehensive new guidelines for the admissibility of eyewitness identification evidence in Oregon state courts.

At about 10 p.m. on August 21, 2003, Noris and Sherl Hilde were both shot in their trailer while camping in the Umpqua National Forest in Douglas County, Oregon. Mrs. Hilde was shot first, while standing at the trailer's window, and her husband was shot while talking to the 9-1-1 operator. Mrs. Hilde was seriously wounded but con-

disadvantage flowing to [Greensill] from being tried three decades after the offences are said to have occurred. A material part of the forensic disadvantage is the death of the appellant's husband."

[Click here to read](#) the appeals court's ruling in [Greensill v The Queen](#) [2012] VSCA 306 (December 13, 2012).

Days after her release Greensill [said when interviewed](#) by *The Age* newspaper in Melbourne: "I can't accept in my mind that it's over and I'm really home and I don't have to go back. It hasn't sunk in yet. It's very hard being in there [prison] when you're not guilty. But my three sisters and children and the letters and visits from people all said to hang on because justice will be done one day."

It isn't yet known if Greensill will file a lawsuit for compensation, or if the State of Victoria will attempt to recover the \$62,735² it paid to Jim as "victim" compensation.

The aspect of Josephine Greensill's case of particular interest to people in the United States are the State of Victoria's laws pertaining to "forensic disadvantage" that are specifically intended to protect a person such as Greensill from being convicted of alleged criminal conduct about which possibly exculpatory evidence doesn't exist because of the passage of time from when an alleged crime occurred and when a complaint was made. See, Section 61 of the

scious, and she told the 9-1-1 operator she didn't know who "they" -- referring to the shooter or shooters -- were who shot her and her husband. While emergency services personnel were transporting her to the hospital she stated repeatedly she did not know who the perpetrators were and she had not seen "their" faces.

When the Hilde's arrived at their campsite on the morning of August 21 a man named Samuel Lawson was camped there. When informed they had reserved the campsite the thirty-year-old Lawson apologized, he packed up, and about 40 minutes after the Hilde's arrived he left the area.

The day after the shooting Lawson voluntarily contacted the police when he saw news reports about the shooting. He told the police he had seen and talked with the Hilde's at their campsite the morning they arrived --

Lawson cont. on page 15

Crimes Act and Section 165B of the Evidence Act, cited verbatim on pages 11-13 of the [court of appeal's ruling](#).

The appeals court judges in Greensill's case explained at length she was prejudiced because of the unavailability of possibly exculpatory evidence due to the 28 year delay from 1979 to 2007 for her accusers to file a complaint or apparently ever tell anyone about the alleged orgy in her backyard. The appeals court was particularly concerned that it was only after Jim knew Greensill's husband died that Jim contacted the police and he and Dan gave their statements. That deprived Greensill of her husband's testimony for the jurors to consider.

Endnotes:

1. "Jim" was identified in Court papers as "RS" and "Dan" was identified in Court papers as "SC."
2. Jim was awarded AUSD\$65,000 on April 13, 2012. That was \$62,735 at the exchange rate of AUSD\$1.036 to USD\$1 on 4-13-12. There is no record that Dan submitted a compensation claim.

Sources:

[Greensill v The Queen](#) [2012] VSCA 306 (December 13, 2012)

[Court quashes sex offence conviction](#), *The Age* (Melbourne, AUS), December 10, 2012

[Doubts over accusers' evidence led to teacher's release](#), *The Age* (Melbourne, AUS), December 13, 2012

[Female teacher who abused boys](#), 8, in 1970s shows no remorse, *Herald Sun* (Melbourne, AUS), July 21, 2010

[Teacher Josephine Mary Greensill](#) jailed for sex with boys, 8, *Herald Sun*, August 10, 2010

Lawson cont. from page 14

which was about 12 hours before the shooting.

Two days after the shooting a detective went to Mrs. Hilde's hospital room and showed her a photo line-up that included Lawson's photo. She couldn't speak because of a breathing tube in her throat, so she shook her head "No" in response to the detective's question if the shooter was among the photos. The detective then asked if she saw the photo of anyone she had seen at her campsite earlier on the day of the shooting and she nodded "Yes" -- which corroborated what Lawson had told the police.

Mrs. Hilde was still in the hospital when the police again questioned her about two weeks after the shooting. She could speak and "[she told detectives](#) that after her husband was shot, the perpetrator had entered the trailer and put a pillow over her face. She said that she did not know who he was, and that she could not see the man because it was dark and because of the pillow. She was apologetic that she was unable to help the police more and did not think she could identify anyone."

About a month after the shooting the detectives again interviewed Mrs. Hilde. She changed her story slightly in stating she had briefly seen the shooter. She was shown another photo lineup that included Lawson's photo, and she said the shooter wasn't among the photos. She did not tell the detectives the man who had been at their campsite earlier on the day of the shooting was their assailant.

About a week later Mrs. Hilde was again questioned by the detectives. After they asked her leading questions about the man who had been at their campsite when they arrived, she "[told the detectives](#) that she now believed that man was their assailant. However, she "could not swear" it was him, because she claimed to have seen his face only in profile. Mrs. Hilde declined to view a profile lineup, telling the detective that she did not think she would be able to pick her attacker out of the lineup. The detectives then informed Mrs. Hilde that "the man that you've identified is the person that we have in custody," and identified Samuel Lawson by name."

After that a worker at the facility where Mrs. Hilde was convalescing showed her a newspaper photograph of Lawson with a caption he was arrested for the shootings. Two years after the shootings and about a month before Lawson's trial in 2005, police detectives exposed Mrs. Hilde to Lawson several more times, including surreptitiously bringing her

into the courtroom during a pretrial hearing so she could see him in person. After repeatedly seeing Lawson, Mrs. Hilde then picked him out of the same photo lineup from which that she had been unable to identify her assailant after the attack. The Douglas County DA's Office didn't inform Lawson's lawyers of the detectives activities to influence Mrs. Hilde's identification.

During Lawson's trial Mrs. Hilde positively identified him as the man who shot her and her husband, and [when asked](#) whether she had any doubt as to her identification, Mrs. Hilde responded: "Absolutely not. I'll never forget his face as long as I live." She later added that she "always knew it was him."



The trial judge denied the objection of Lawson's lawyer that Mrs. Hilde's identification was unreliable because it had been tainted by suggestive police procedures. The judge stated that "the reliability and probative value" of Mrs. Hilde's identification was for the jury to decide.

Mrs. Hilde's testimony was crucial for the prosecution because there was no physical, forensic, confession or informant evidence linking Lawson to the shootings. The jury convicted Lawson on five counts of aggravated murder, three counts of attempted aggravated murder, and two counts of first-degree robbery. He was sentenced to life in prison without the possibility of parole.

[Lawson argued](#) during his appeal to the Oregon Court of Appeals that "Mrs. Hilde should not have been permitted to identify defendant in court because police officers had used "unduly suggestive" identification procedures prior to defendant's trial." Oregon's precedent for evaluating the admissibility of contested eyewitness identification testimony was *State v. Classen*, 285 Or. 221, 590 P.2d 1198 (1979), which established a two-part test: The trial court must first determine if the procedure used to obtain the witnesses' identification was suggestive, and if so, whether the identification has a source independent of the suggestive procedure that makes it reliable. [The appeals court](#) affirmed Lawson's conviction after determining that although the police had used suggestive procedures, Lawson's lawyer had extensively cross-examined Mrs. Hilde and an instruction cautioned the jury about the reliability of eyewitness identification, thus Mrs. [Hilde's identification](#)

was "reliable enough to allow the jury to consider it in its deliberations."

Lawson appealed to the Oregon Supreme Court. On November 29, 2012 the [Court ruled in](#) *State of Oregon v. Samuel Adam Lawson*, No. SC S059234 (OR SC) that Lawson was entitled to a new trial because of questions about the reliability of Mrs. Hilde's identification. The Court also ruled that in the 33 years since *Classen* there have been considerable developments in determining the reliability of eyewitness evidence which necessitated the Court to establish new comprehensive guidelines for a trial court to determine the admissibility of eyewitness evidence the defense is seeking to exclude. The Court stated regarding Lawson's conviction:

"The alterations in Mrs. Hilde's statements over time are indicative of a memory altered by suggestion and confirming feedback. ... In light of current scientific knowledge regarding the effects of suggestion and confirming feedback, the preceding circumstances raise serious questions concerning the reliability of the identification evidence admitted at defendant's trial. ... - we reverse and remand the case to the trial court for a new trial. Due to the novelty and complexity of the procedures we have articulated today, the parties must be permitted on retrial to (1) supplement the record with any additional evidence that may bear on the reliability of the eyewitness identifications at issue here, and (2) present arguments regarding the appropriate application of the new procedures set out in this opinion." [48-49]

Regarding the new guidelines for admitting contested eyewitness evidence the Court stated:

"To summarize: Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence. See OEC 104; OEC 307. When an issue raised in a pretrial challenge to eyewitness identification evidence specifically implicates OEC 602 or OEC 701, those preliminary facts must include, at minimum, proof under OEC 602 that the proffered eyewitness has personal knowledge of the matters to which the witness will testify, and proof under OEC 701 that

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any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact.

If the state satisfies its burden that eyewitness evidence is not barred by OEC 402, the burden shifts to the defendant to establish under OEC 403 that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. If the trial court concludes that the defendant opposing the evidence has succeeded in making that showing, the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence.” [44]

[Click here to read or download](#) *State of Oregon v. Samuel Adam Lawson*, No. SC S059234 (OR SC). Oregon is now at the forefront of trying to ensure contested eyewitness testimony has a reasonable degree of reliability before it is admissible evidence.

Under the Oregon Supreme Court's new guidelines it seems doubtful Lawson will be retried because there is no evidence he committed the crime except for Mrs. Hilde's testimony, and it is known she only identified him after the police detectives repeatedly suggested through photographs and words that he was her assailant. The irony of Lawson's prosecution is his identity wouldn't have been known except that he voluntarily contacted the police to tell them he saw and talked with the Hilde's at their campsite about 12 hours before the shootings.

Sources:

[State of Oregon v. Samuel Adam Lawson](#), SC S059234 (OR Sup. Ct., November 29, 2012) (en banc)

[State of Oregon v. Samuel Adam Lawson](#), No. A132640 (OR Ct. of Appeals, December 15, 2010)

[Oregon Supreme Court ruling](#) described as 'landmark' decision on eyewitness testimony, *The Oregonian* (Portland), November 29, 2012

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Will Kirstin Lobato's New Scientific Evidence Of Her Actual Innocence Matter To The Nevada Supreme Court?

By Hans Sherrer

Commentary for the *Las Vegas Tribune*
(July 22, 2013)

Is it in the public interest for a person to be imprisoned for crimes there is scientific evidence the person didn't commit? The Nevada Supreme Court is currently considering whether new scientific evidence of Kirstin Blaise Lobato's actual innocence warrants overturning her convictions.

Duran Bailey was a homeless man whose body was found around 10 p.m. on July 8, 2001 near the Las Vegas Strip in a bank's trash enclosure. Bailey's autopsy determined he died from Blunt Head Trauma, and he had many bloody wounds.

Kirstin Lobato was convicted on October 6, 2006 of voluntary manslaughter and other charges related to Bailey's homicide. She was sentenced to 13 to 35 years in prison.

An undisputed fact during Kirstin's trial is she was at her home in Panaca, Nevada 165 miles north of Las Vegas on July 8, 2001 from at least 11:30 a.m. and probably from 10 a.m., until after Bailey's body was found that night. A Nevada DOT supervisor testified the driving time from Las Vegas to Panaca is about three hours.

Since Kirstin couldn't have been in Las Vegas earlier than 8:30 a.m. (11:30 minus 3 hours), and probably no earlier than 7 a.m. (10 a.m. minus 3 hours), it is physically impossible she committed Bailey's homicide if he died *after* 8:30 a.m. on July 8, and there is a reasonable doubt she did so if he died *between* 7 and 8:30 a.m.

To establish Bailey could have died before 7 a.m. the prosecution introduced the testimony of Clark County ME Dr. Lary Simms. The jury relied on his testimony it is *possible* Bailey died before 7 a.m. to convict Kirstin.

After Kirstin's convictions were affirmed on appeal in 2009, a post-conviction investigation of her case was undertaken to discover new evidence, including more precisely determining Bailey's time of death.

The science of forensic entomology dates

back more than 1,000 years. It is known "Blow flies are attracted to human remains, and any other carrion or meat product, in order to lay their eggs. Eggs are laid within minutes of the remains being located by blow flies, meaning that they are laid within a very short time after death, usually minutes. ... Therefore, a bloody wound is extremely attractive to female blow flies and they would be expected to lay large numbers of egg masses on the body. ... Blow flies are *diurnal* animals, meaning they are *only active during daylight hours*." (Report of Dr. Gail S. Anderson, Dec. 17, 2009)

Three forensic entomologists were provided with reports, weather data, testimony, and photographs related to Bailey's death. They independently determined no insect eggs are visible on Bailey's body, and thus to a reasonable scientific certainty he died *after sunset at 8:01 p.m.* – and he most probably died *after full dark at 9:08 p.m.* The new scientific forensic entomology evidence establishes it is physically impossible Kirstin committed Bailey's homicide because it is undisputed she was home in Panaca at 8 p.m.



Kirstin Blaise Lobato during her trial in Sept. 2006. (Michelle Ravell)

A number of cockroaches were in a beer can found within arms reach of Bailey's body. The three forensic entomologists noted in their reports there were no insect bites on Bailey's body. Cockroaches feed on human flesh and unlike flies they are nocturnal. Consequently, Bailey likely died shortly before his body was discovered since cockroaches would have feasted on his body if it had lain in the dark trash enclosure for any length of time.

Dr. Simms did not consider the absence of insect eggs or insect bites when he testified about Bailey's time of death, even though considering their presence or absence is necessary to reliably determine when he died.

The new forensic entomology evidence renders Dr. Simms' testimony as lacking any credibility about Bailey's time of death and that his body could have lain in the trash enclosure where he was killed for up to 18 hours before being discovered.

In May 2010 Kirstin filed a *habeas corpus* petition in the Clark County District Court that included a request for a new trial based on her new evidence Bailey died when she was 165 miles from Las Vegas.

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Clarence Darrow: Attorney for the Damned

Review of the book by Hans Sherrer

Clarence Darrow is widely considered one of the greatest lawyers in American history. During his career that spanned almost six decades Darrow won cases against seemingly impossible odds, and in cases he couldn't win he was able to save a client from the gallows or the electric chair when no sane person would think it was possible. Darrow was known as a champion of the underdog and because of his accomplishments he has a bigger than life persona that borders on the mythical.

Two primary sources of information about Darrow's life have been his autobiography *The Story Of My Life* (Charles Scribner's Sons) published six years before his death at 80 in 1938, and Irving Stone's *Clarence Darrow for the Defense* (1941). *Clarence Darrow: Attorney for the Damned* by John A. Farrell can be added to those books as

Lobato cont. from page 16

The State's defense to Kirstin's new evidence is the forensic entomologists examined photos of Bailey's body, while Dr. Simms personally saw it. Forensic entomologist Dr. Gail Anderson's reply to the State's defense exposed it has no scientific merit or rational basis, when she explained examining digitized photographs "... allows the observer to increase the size of the image at will, almost as if one were using a microscope." (Reply of Dr. Anderson, Sept. 7, 2010)

Kirstin's new evidence Bailey died in Las Vegas when it is known she was in Panaca, is consistent with the absence of any physical, forensic, eyewitness, surveillance, documentary, or confession evidence she was in Las Vegas on July 8, 2001 and Bailey's assailant.

A key unanswered question is if the new scientific evidence Kirstin Lobato is imprisoned for a crime it is physically impossible she committed will matter to the Nevada Supreme Court, which is now considering the appeal of her trial judge's denial of her *habeas corpus* petition.

*This is a condensed version of an article available online at, www.justicedenied.org/wordpress/archives/2475. Detailed information about Ms. Lobato's case is at, www.justicedenied.org/kbl.htm

indispensable reading for a person waiting to learn about Darrow's life and gain an understanding of his motivations and the scope of his accomplishments.

Darrow didn't graduate from college or law school so he apprenticed to become a lawyer. After moving to Chicago in his early 30s he became a successful and prominent corporate lawyer until he abandoned that phase of his career to open his own law practice and primarily represent criminal defendants. He defended his first murder case when he was 37. Darrow's client had confessed to murdering Chicago Mayor Carter H. Harrison, Sr., and Darrow's insanity defense was unsuccessful: the man was not only convicted, but sentenced to death and executed. Darrow was an ardent foe of capital punishment and whatever lessons he learned from that case he learned well, because in an age when executions were common and the appeals process short, none of his clients in the almost 50 murder cases he handled after that case were executed.

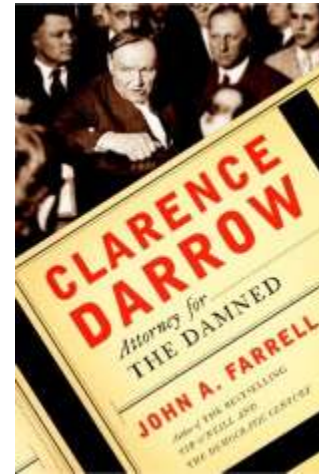
The book delves deeply into Darrow's life and doesn't gloss over his foibles or attempt to portray him as an angelic Superman. Darrow's success wasn't accidental: he was hard-working, well-read, he had a remarkable memory, he was a gifted orator, and he was a brilliant strategist with an exceptional ability to communicate his ideas -- especially to skeptical people such as jurors hardened by the press and their prejudices against a defendant. Darrow also played hard. He was a drinker, and although his second wife Ruby was devoted to him, he was a serial philanderer.

Darrow's reputation and the demand for his expertise enabled him to make a lot of money, but he lost his accumulated wealth at least three times from risky investments. The last time was when he was wiped out as a result of the 1929 stock market crash, and at the age of 72 he had to once again start out financially from scratch.

There are of course detailed accounts in the book of Darrow's most well-known cases. Those cases include his defense of Eugene Debs in the American Railway Union's strike in 1894 against Pullman; his defense in 1911 of John and James B McNamara -- the alleged bombers of the *Los Angeles Times* building; his own two trials for allegedly bribing jurors in the McNamara case; his defense of infamous thrill killers Nathan Leopold and Richard Loeb in 1924; and, his defense of John T. Scopes in 1925 that is commonly known as the Scopes Monkey Trial. Darrow's last court case was in 1932

when he defended four defendants in Hawaii charged with murder for the lynching of a man who allegedly raped the wife of one of the defendants. His last case as a lawyer was in 1936 when he argued the appeal of Jesse Binga, a black banker convicted of fraud. Binga was released on March 5, 1938 and Darrow died eight days later. The background of Darrow's many prominent cases serve as a history lesson about dominant social issues during periods of Darrow's life, including religious and racial inequities, and worker dissatisfaction with long hours, low pay and dangerous working conditions.

It comes through loud and clear in *Clarence Darrow: Attorney for the Damned* that lawyering was rarer in the late 1800s and early 1900s than today: it was akin to a no-holds barred verbal boxing match. Darrow may have been the best, but many defense lawyers during that era uncompromisingly fought for their clients with a vigor and a devil may care attitude about stepping on the toes of the prosecutor and judge that is unknown today.



Clarence Darrow: Attorney for the Damned is a must read for anyone wanting to gain insight into Darrow's life and career, but it is also valuable for its depiction of the turbulent times during Darrow's life and the controversies he became involved in.

Clarence Darrow: Attorney for the Damned, Random House (2011), 576 pages. The book is available at bookstores and from online retailers including amazon.com and barnesandnoble.com.

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Usama bin Laden Is Legally Innocent With Dismissal Of 1993 and 1998 Indictments

By Hans Sherrer

U.S. District Court Judge Lewis A. Kaplan [ordered dismissal](#) of two federal grand jury indictments of Usama bin Laden on June 17, 2011. The dismissals were in response to a *nolle prosequi* motion filed by the U.S. Attorney's Office in Manhattan based on evidence that bin Laden was killed on May 1, 2011. Usama bin Laden was commonly referred to in the press as Osama bin Laden.

The indictments were the only pending criminal charges against bin Laden.

In June 1998 bin Laden was secretly indicted by a federal grand jury in New York City on one count of "Conspiracy to Attack Defense Utilities of the United States." The only act of violence alleged [in the indictment](#) (98 CR 539) was:

1. On October 3 and 4, 1993, members of Al Qaeda participated with Somali tribesmen in an attack on United States military personnel serving in Somalia as part of Operation Restore Hope, which attack killed a total of 18 United States soldiers and wounded 73 others in Mogadishu;

After truck bombings in August 1998 outside the U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya killed 224 people, including 12 U.S. citizens, an indictment was issued against bin Laden in November 1998. The indictment (98 CR 1023) alleged among other things that bin Laden conspired to kill Americans for his support of the embassy bombings. That indictment was supplemented by two superseding indictments, the first in June 1999 and the second in May 2000. Those superseding indictments did not add any new acts of violence that bin Laden allegedly supported.

Bin Laden was added on June 7, 1999 to the FBI's Most Ten Wanted list. [His FBI poster](#) stated he was wanted for "Murder Of U.S. Nationals Outside The United States, Conspiracy To Murder U.S. Nationals Outside The United States, Attack On A Federal Facility Resulting In Death."

Hours after the events of September 11, 2001 elected officials claimed and the press widely reported that bin Laden was involved. Bin

Laden was not bashful about taking credit for the things he was involved in, but he publicly denied any involvement in 9/11. Consistent with bin Laden's denials the United States did not attempt to pursue any criminal terrorism charges against bin Laden related to 9/11 or for any alleged harm to any American anywhere in the world after the August 1998 east African embassy bombings, for which he had been indicted. That fact did not interfere with public officials and the press painting bin Laden for years after 9/11 as a satanic figure with almost supernatural like powers to direct from a secret location his minions around the world. Bin Laden was portrayed by politicians and the media as a real-life Emanuel Goldstein -- who was the boogeyman in George Orwell's 1984 that the government relied on to justify its repressive domestic policies.

There was speculation in the years following September 11, 2001 that bin Laden was dead, but on May 1, 2011 it was reported that U.S. Navy seals had stormed bin Laden's home in Abbottabad, Pakistan without the foreknowledge or permission of the Pakistani government and killed him. It has been reported that bin Laden was unarmed and in his bedroom wearing nightclothes at the time he was repeatedly shot. There was no reported attempt to apprehend bin Laden alive. It has also been reported that afterwards bin Laden was buried at sea, and to date no pictures of him related to the May 2011 raid or his burial have been publicly released.¹

Bin Laden died with no criminal history because he had never been convicted of any crime in the United States or any other country. Bin Laden, a former U.S. government asset and CIA operative, had never even been arrested for an alleged crime. When bin Laden was removed from the FBI's Most Ten Wanted list in May 2011 [his FBI poster](#) did not state he was wanted for any alleged criminal act or terrorism committed in the United States, or anywhere in the world after the 1998 embassy bombings.

The circumstances of Bin Laden's death that have been reported are disturbing to Americans because he was under indictment by the U.S. government for alleged criminal acts against Americans in foreign countries in 1993 and 1998. The United States Department of State offered "a reward of up to \$25 million for information leading directly to the apprehension or conviction of Usama Bin Laden." Bin Laden was officially classified as a fugitive from justice, and his extradition could have been sought from a country where he was captured.

It is known that when convenient the U.S. government has bypassed the extradition process and kidnapped a person for return to the U.S. for trial. A well-known case is that of Panama's President Manuel Noriega, who the U.S. forcibly transported to the United States in 1989. Noriega was convicted by a jury in April 1992 of federal drug trafficking, racketeering, and money laundering charges. His 40 year sentence that was reduced to 30 years on appeal, was completed in 2007. Noriega was held in custody for almost 3 years fighting extradition to France. In April 2010 Noriega was extradited to France, where he was convicted of money laundering in July 2010 and sentenced to 7 years in prison.

As Noriega's case illustrates, every person accused of a federal crime -- regardless of who they are, where they are, or what they allegedly did or didn't do -- has specific due process rights, including the right to a jury trial to ascertain the truthfulness of the charges against him or her. The invasion of bin Laden's home in the middle of the night without a warrant and the summary shooting of him when he was unarmed has no precedent in American history as an action that conforms with the accepted norm of due process. Under the common-law dating back to the Magna Carta in 1215 a person's home is their castle and a person has the right to forcibly resist an unlawful invasion of his or her home by authorities.² The federal government made no effort to lawfully search bin Laden's home under U.S. or Pakistani law, and there has been no evidence publicly disclosed that the military personnel involved even had an arrest warrant for bin Laden -- or that he forcibly resisted arrest. When you strip away the hysterical rhetoric about bin Laden the pre-planned storming of his home without any judicial process is no more legally justifiable than the police using lethal force against an unarmed person whose home is stormed without warning and without a warrant in Evansville, Indiana or Bakersfield, California.³ That is particularly the case in a situation such as bin Laden's when there was not even an allegation that he had ever personally killed anyone.⁴ In contrast, the former Boston mobster and FBI informant Whitey Bulger was on the FBI's Most Wanted List for allegedly personally committing more than a dozen murders, and in spite of being a notoriously violent person he [was peacefully captured](#) in Santa Monica, California six weeks after bin Laden's home was stormed.

The test of whether due process is an immutable principle or merely something to be

Laden cont. on page 19

Laden cont. from page 18

given lip service when it is convenient is if it is accorded to a person under the most extreme circumstances. Everyone wants due process to be accorded a respected person accused of a crime, but those same people should just as enthusiastically advocate that an accused serial rapist or murderer must be accorded the same due process rights. If only persons considered respectable are automatically accorded due process, then it is not a right, but a privilege bestowed by the government that can be denied at the discretion of those people in a position of power to do so.

Lynching is decried because it relies on passion and the impression a person is guilty rather than a consideration of the facts. Members of a lynch mob fervently feel a person is guilty -- and to them that feeling is enough. It is precisely that attitude of blind vigilantism that due process is intended to counter by providing for an analysis of the facts supporting whatever a person is accused of committing. The lynching of bin Laden by shooting instead of a rope constitutes a triumph of the mob led by the President of the United States and the major media, and a breakdown in the rule of law and a public and orderly process to determine if he was guilty of what he was indicted of committing.

After World War II high ranking Nazi officials who had been demonized in the press for years, and who were accused of heinous crimes against humanity light-years beyond anything alleged against bin Laden, were not summarily executed when found or after they were taken into custody. Those persons that included Hitler's right-hand man Hermann Goering, were afforded the due process of public trials during which they had the opportunity to present a vigorous defense to refute the grave charges against them. Only a handful of the high-ranking Nazis were sentenced to death after their conviction, with most receiving prison terms. Some of them were acquitted. Japanese military and civilian officials captured after WWII were also afforded public trials for their alleged crimes.

Prosecutors control the secret grand jury process since they dictate what evidence the grand jurors see and what witnesses testify. That is why it has often been said that a prosecutor can indict a ham sandwich. Consequently an indictment against a person means nothing if the truthfulness of the government's alleged evidence is untested during a public trial.

Although it may seem a novel thought, it is possible that the federal prosecutor's actual

evidence against bin Laden for the 1993 and 1998 bombings was so sketchy that he could have been acquitted or had a hung jury after a public trial in the U.S. However, in spite of being legally presumed innocent bin Laden was accorded no due process rights. The possibility he wouldn't have been convicted was eliminated when he was killed with no attempt to apprehend him for a public trial in the U.S. Consequently, bin Laden's death not only denied him his day in court, but it relieved federal prosecutors of ever having a jury judge the value of their evidence in support of his indictments.

Usama bin Laden is legally innocent of ever having violated any state or federal law. Dismissal of his 1993 and 1998 indictments on June 17, 2011 means those indictment's allegations will forever remain unproven accusations. Since he was not indicted for any of the events that occurred on September 11, 2001, there are only unproven suspicions he was involved in those events.

Endnotes:

1 There is speculation that bin Laden was not present or killed during the raid on May 1, 2011 given the circumstances that there was no effort to apprehend "bin Laden" alive, and since "his" body was disposed at sea there is no way to independently determine the body's identity. Reports that DNA from the disposed body establish to a high degree of certainty that it was bin Laden are unverifiable because the federal government controls all the evidence, so there is no way to verify that the DNA tested was from the body and not from a bin Laden relative -- or if the DNA test results were not simply fabricated from thin air. Likewise, the technology is readily available to edit a photograph or produce the photograph of a person at a particular place and time -- so the photographs of bin Laden's body that have not yet been publicly released are meaningless without independent verification of his identity from examination of the body. Questions about whether bin Laden died on May 1, 2011 or some time prior to then will persist for decades if not centuries -- just as questions of whether Marilyn Monroe's death was accidental or a murder persist, and there are questions of whether there was a shooter of President Kennedy on the grassy knoll.

2 The English common-law right to resist unlawful police action has been traced by scholars trace to the Magna Carta in 1215. See e.g., Craig Hemmens & Daniel Levin, *Not a Law at All: A Call for the Return to the Common Law Right to Resist Unlawful Arrest*, 29 Sw. U. L. Rev. 1, 9 (1999). In the case of *Bad Elk v. United States*, 177 U.S. 529, 535 (1900) the United States Supreme Court recognized that: "If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." The Supreme Court affirmed that right in the 1948 case of *United States v. Di Re*, 332 U.S. 581, 594 (1948) ("One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.")

3 The case for President George W. Bush's criminal liability for the U.S.'s 2003 invasion of Iraq is detailed in *The Prosecution of George W. Bush for Murder* (Vanguard Press, 2008) by former Los Angeles County Assistant District Attorney Vincent Bugliosi. Mr. Bugliosi was the lead prosecutor of Charles Manson and other high-profile defendant. A case can likewise be made that President Obama can bear criminal liability

for his executive order that authorized the storming of bin Laden's home during which he was summarily killed. A president cannot at will issue an order that abrogates or otherwise suspends the U. S. Constitution and an indicted person's right to due process of law -- especially since a person is legally presumed innocent of the their indicted crime(s) until a jury (or a judge in a bench trial) determines the person has been proven guilty beyond a reasonable doubt in a court of law. For all practical purposes President Obama acted as bin Laden's judge, jury and executioner by issuing his executive order authorizing the raid.

4 Not only was there no evidence bin Laden was violent, but documents seized during the raid on bin Laden's home reveal he was completely marginalized by al-Qaida's leaders and he had no influence over the organization. A U.S. official description of bin Laden's relationship to al-Qaida is, "He was like the cranky, old uncle that people weren't listening to." (See, "Official Bin Laden lost influence, was 'cranky, old uncle.'" *The Seattle Times*, June 29, 2011, p. A1, A6.)

Improper Submissions: Records of a Wrongful Conviction

by Erma Armstrong is the story of Karlyn Eklof, a young woman delivered into the hands of a psychotic killer. She witnessed him commit a murder and she is currently serving two life sentences in Oregon for that crime. *Improper Submissions* documents:



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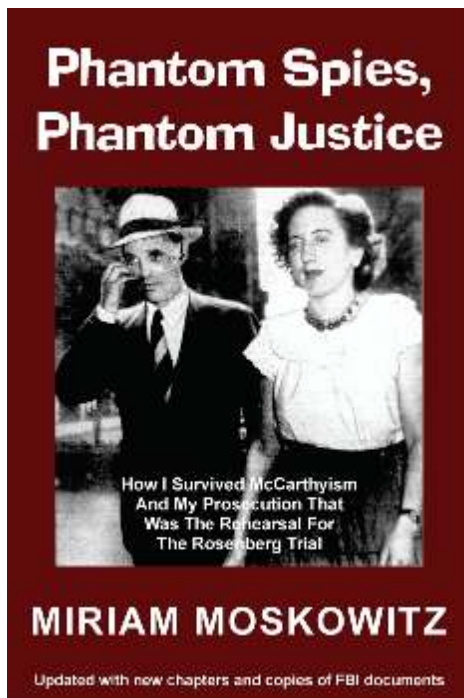
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Phantom Spies, Phantom Justice Now Available!

Phantom Spies, Phantom Justice by Miriam Moskowitz was published in July 2012 by Justice Denied/The Justice Institute. The book is Ms. Moskowitz' autobiography that explains how it came to be that in 1950 she was falsely accused, indicted and convicted of obstruction of justice in a grand jury that was investigating Soviet espionage. The books subtitle is *How I Survived McCarthyism And My Prosecution That Was The Rehearsal For The Rosenberg Trial*. The Afterword written by Justice Denied's editor and publisher Hans Sherrer states in part:

Miriam Moskowitz is an innocent person who was caught up in the whirlwind of anti-communist hysteria that prevailed in this country at the time of her trial in 1950. We know that because of FBI documents she obtained through the Freedom of Information Act decades after her conviction for conspiring to obstruct justice during a grand jury investigation.

The prosecution's case depended on the trial testimony of FBI informant Harry Gold. He testified that in 1947 *she observed* a conversation during which he and her business partner, Abraham Brothman, alleg-



edly discussed providing false testimony to a grand jury investigating possible Soviet espionage. She did not testify before that grand jury.

The FBI documents Ms. Moskowitz obtained are proof that prior to her trial Mr. Gold told the FBI *she was not present* during that alleged conversation. Furthermore, Mr. Gold told the FBI he didn't speak candidly

in front of Ms. Moskowitz because of her possible negative reaction if he said something incriminating in her presence, and he didn't like her.

Although Ms. Moskowitz's case had nothing directly to do with the Rosenberg trial that took place four months after her trial, they were tied together because Mr. Gold was a key witness against the Rosenbergs and the same prosecutors and judge were involved in both trials.

Phantom Spies, Phantom Justice is a compelling story of how an innocent 34-year-old woman found herself being publicly branded as an enemy of the United States. Ms. Moskowitz is now 96 and still seeking the justice of having her conviction overturned, although she can't get back the time she spent incarcerated because of her two-year prison sentence.

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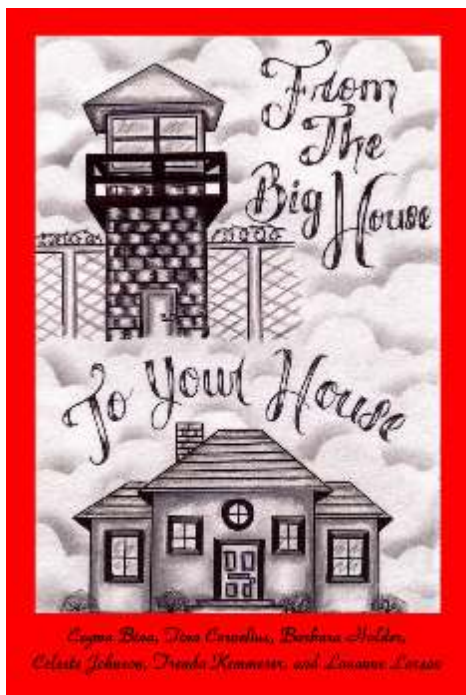
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